[redacted] CS 202 879

AUTHOR Trauth, Denise M.; Huffman, John L.
TITLE The Pacifica Case: The Supreme Court's New Regulatory Rationale for Broadcasting.
PUB DATE Nov 79
NOTE 13p.; Paper presented at the Annual Meeting of the Speech Communication Association (65th, San Antonio, TX, November 10-13, 1979)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Broadcast Industry; *Censorship; Communication (Thought Transfer); *Court Litigation; *Federal Regulation
IDENTIFIERS *FCC v Pacifica Foundation; *Federal Communications Commission; *Supreme Courts

ABSTRACT

The rationale for broadcast regulation has undergone some changes over the years. At first, the rationale for such regulation was based on the concept that the airwaves are owned by the public and that the regulatory bodies act as agents for the public in controlling what is transmitted. In 1943, the United States Supreme Court built a rationale for regulation based on the limited radio frequency spectrum. This scarcity rationale later evolved into a preferred position rationale which said that once the scarcity rationale was applied, existing broadcasters are in a preferred position over others who might wish to enter the field and this alone could become the basis for regulation. In the "FCC v. Pacifica Foundation" case, the Supreme Court articulated a new rationale: the pervasiveness of the broadcast media. This was taken to mean that the broadcast media have established a uniquely pervasive presence in the lives of all Americans and that broadcasting is uniquely accessible to children. The implications of this rationale are that it allows the Federal Communications Commission to assume a protectionist stance toward regulation that is consistent with trends occurring in other regulatory bodies. (TJ)

The Pacifica Case:

The Supreme Court's New Regulatory Rationale For Broadcasting

by

Denise M. Trauth
School of Speech Communication
Bowling Green State University

and

John L. Huffman
School of Journalism
Bowling Green State University

Presented during the competitive papers session of the Communication and Law Committee during the Speech Communication Association annual national convention, November, 1979, San Antonio, Texas.

This study was made possible in part by a grant from the Faculty Research Committee, Bowling Green State University.

BROADCASTING REGULATORY RATIONALE CHANGED BY COURT

Introduction

The rules and regulations promulgated by the Federal Communications Commission (FCC) have always required a rationale to justify their legal existence. Such a rationale was and is necessitated by the apparent contradiction between First Amendment guarantees of freedom of expression for radio and television on the one hand,[1] and a maze of extensive regulation and licensing requirements enacted by the FCC and upheld by the courts on the other hand.

Legal scholar Edward Levy has pointed out that it is a pretense in the American legal process that law is really a system of known rules applied by a judge. He explains:

> In an important legal sense rules are never clear, and if a rule had to be clear before it could be imposed, society would be impossible. The (legal) mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity.[2]

In the gap of ambiguity lying between the First Amendment to the Constitution and the Communications Act of 1934, the courts and regulatory bodies have devised and embellished a number of different rationales for the regulation of broadcasting. FCC v. Pacifica Foundation,[3] adjudicated by the U.S. Supreme Court in 1978, appears to have established a new rationale; ironically, it is one that is almost the conceptual opposite of the rationale the Court first used to justify the regulation of radio and television.

Early Broadcast Regulation Rationale

The original rationale underlying broadcast regulation was what has been termed the "public ownership" concept.[4] This rationale posited that the airwaves were "owned" by the public. Thus, the government had a right and duty, despite any apparent First Amendment restrictions, to act as agent for the public in controlling what was transmitted on those airwaves. Since the print media did not use anything that was publicly owned, the government had no compelling interest in regulating them.

It was assumed that the public had been served through its Congressional representatives in 1934 when the Federal Communications Act became law. The Act stipulated that the broadcast licensees must operate in the public convenience, interest or necessity. Defining the "public interest" was to be the function of the FCC. It is interesting to note that the "public interest" standard was borrowed from the Radio Act of 1927. The senators drafting the 1927 Act introduced the term "public interest" for two reasons: first, it was already in use by the Interstate Commerce Commission as a standard for regulating public utilities and railroads; and, second, the lawmakers could not come up with any kind of unique standard.[5]

Scarcity Rationale and Preferred Position Rationale

In its initial encounter with the concept of regulation of broadcasting in 1943, the U.S. Supreme Court built a rationale for such regulation based on the limited radio-frequency spectrum. The Court saw the airwaves as not only a valuable publicly-owned resource, but also as a finite resource that must be carefully controlled and allocated. The 1943 case, National Broadcasting Co. v. United States,[6] grew out of a clash between the Federal Communications Commission and the networks.

The FCC had issued the Chain Broadcasting Rules, which defined the permissible relationship between networks and affiliate stations. The Supreme Court upheld the Rules and the FCC, and used the scarcity rationale to do so:

> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication--its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.[7] (Emphasis added.)

The Court went on to say:

> Unlike other media of expression, radio inherently is not available to all. That is its unique characteristic; and that is why, unlike other modes of expression, it is subject to government regulation.[8]

The scarcity rationale was still the foundation for broadcast regulation when the Court adjudicated Red Lion Broadcasting Co. v. Federal Communications in 1969. The Fairness Doctrine, a programming requirement since 1949, was challenged and upheld. The Court took this opportunity to discuss at length the scarcity rationale for regulation. It said:

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by government.[9]

In answering the First Amendment issue that the Red Lion appellees raised, Justice White, writing for the majority, said:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[10]

However, the Court apparently perceived that the scarcity rationale, in the face of technological advances such as cable television that would vastly increase channel space, was on its way to becoming logically infirm. Therefore, the Court provided a new broadcast regulation rationale, the "preferred position" rationale, which was presented as an evolutionary result of the scarcity rationale. The Court said:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.[11] (Emphasis added.)

Thus, because the scarcity rationale was once applied, existing broadcasters are in a "preferred position" and this alone can become the rationale for regulation.

Media Differences Rationale

The rationale underlying broadcast regulation was in flux again in 1973 as could be seen in Columbia Broadcasting System v. Democratic National Committee.[12] This case resulted from the consolidation of complaints filed by two groups who wished to gain access to broadcast advertising time to air commercials with editorial messages. The FCC ruled that licensees were not prohibited from having a policy of refusing to accept paid editorial advertisements by individuals and organizations. In upholding the FCC ruling Chief Justice Burger, writing for the majority, used a rationale based in

part on perceived differences between media audiences. Listeners and viewers were a "captive audience" in the sense that once a radio or television set was turned on, the audience was "captured," and could only make a limited number of affirmative decisions. Print media audiences, however, were seen as being able to actively select many stories or pages to be read. Since the broadcast audience didn't share this same freedom, the government was compelled to monitor and regulate the broadcasters. Chief Justice Burger said:

> The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive" audience. . . The "captive" nature of the broadcast audience was recognized as early as 1924 when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of the publication has--to ignore advertising in which he is not interested--and he may resent its invasion on his set."[13]

The Pacifica Case and the Pervasiveness Rationale

In Pacifica, it appears that the Court has articulated a new rationale upon which to base its approval of government regulation of broadcasting--the pervasiveness of the broadcast media.

The facts of the case show that satiric humorist George Carlin recorded a twelve-minute monologue entitled "Filthy Words" before a live audience in a California theater. The monologue begins with Carlin's reference to "the words you couldn't say on the public airwaves, the ones you definitely wouldn't say, ever."

He proceeded to list those words and to repeat them over and over again in a variety of colloquialisms. The recording included frequent laughter from the audience.

At 2 p.m. on October 30, 1973, radio station WBAI-FM, a non-commercial station in New York City owned by the Pacifica Foundation, played the recording. On December 3, 1973, a man who had heard the recording while driving with his young son filed a complaint with the FCC; the Commission sent the complaint to WBAI for comment.

Pacifica responded that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast listeners had been advised that it included "sensitive language that might be regarded as offensive to some." Pacifica called Carlin "a significant social satirist" who "like Twain or Sahl before him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes toward those words."

The Commission did not impose formal sanctions, but stated that the order would be "associated with the station's license file, and in the event subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."

In its memorandum opinion, the FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon "when children are undoubtedly in the audience," and concluded that the language broadcast was indecent and prohibited by the Federal Communications Act.[14]

Three aspects of the facts of Pacifica are particularly relevant in the present context. First, the Commission acted upon one letter of complaint. Second, the complaintant was a member of the national planning board of

Morality in Media who resided in Florida. (His residence raises questions relating to the forum community notion expounded in Miller v. California.[15]: "contemporary community standards are to be defined in terms of local, not national, norms.) Third, the "young son" who heard the monologue was fifteen years old at the time of the broadcast.

Another feature of the case which is noteworthy is the fact that it actually was appealed. Since no fine was imposed by the FCC, there was no financial impetus for the appeal. In most cases dealing with the broadcast of obscene or indecent programs, any fine imposed is usually lower than would be the court costs: thus rarely is an appeal made, and rarely is there the opportunity to test the FCC's decision. An example is the 1973 Sonderling case in which the Commission fined Oak Park, Illinois, radio station WGLD-FM for its "topless radio" format. In its decision to impose a $2,000 fine, the FCC, eager to have a "test case," included an invitation to Sonderling to submit the case to judicial review. But Sonderling declined and instead agreed to pay the fine.[16]

Pacifica was appealed to a three-judge panel of the Court of Appeals for the D.C. Circuit which decided to reverse the FCC's decision. One judge concluded that the FCC has censored Pacifica and had pronounced an overbroad rule, both of which violate the Constitution. Another judge decided that the language at issue was not obscene and thus could not be proscribed. The third judge agreed with the FCC's ruling.[17]

In an opinion written by Mr. Justice Stevens, the U.S. Supreme Court reversed the appellate court decision and upheld that of the FCC. The Supreme Court faced two issues in Pacifica: first, whether the FCC's action constituted forbidden censorship within the meaning of the Federal Communications Act; and second, whether speech that is concededly not obscene may be restricted as "indecent" under the statutory authority of the Act.

The first question was answered in the negative: the FCC's action did not constitute censorship. The second question was not as easy for the Court to answer. It raised the problem of a distinction between "obscene" and "indecent" and the corollary of whether indecent speech which is not deemed obscene can be restricted.

The Court began with the position that the words in question were not categorically excluded from use on radio:

> Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. . . . Indeed, we may assume, . . . that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value" . . . vary with the circumstances . . .
>
> In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shcoking."[18]

Thus, the Supreme Court said that because the protection for the words in question was not absolute, the context of the communication would determine if it is constitutionally protected.

It is in this discussion of context that the Court began to evolve its new rationale for regulation. The apparent "context" of the words in question is a satirical "program about contemporary society's attitude toward language." But the Court did not even discuss this context. Instead, it saw as the "context" of the Carlin monologue the medium of expression--radio.

The Court pointed out that the electronic media have long received a more limited form of First Amendment protection than the print media. The Court observed that "the reasons for these distinctions (between the print and broadcast media) are complex, but two have relevance to the present case.

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . Second, broadcasting is uniquely accessible to children, even those too young to read."[19]

In summing up the case, several points merit special attention. The first relates to the reason for the regulation of broadcasting. It would seem that in drawing the particular distinction between the print and electronic media that it did, the Supreme Court has articulated a new standard for regulation. This standard is to some degree the conceptual opposite of the scarcity rationale since it is predicated not on a limited spectrum but rather on a plethora of signals coupled with an intrusive technology.

The second pertains to the one aspect of pervasiveness of most concern to the Court: the unique accessibility of the broadcast media to children. In this connection, the Court pointed to Ginsberg v. State of New York[20] which upheld a "variable obscenity" law that made it illegal to sell certain publications to children which adults could legally buy. In using Ginsberg to "amply justify special treatment of broadcasting," the Court did not note the one obvious difference between the two cases: Ginsberg allowed adults to continue reading the magazines at issue, while Pacifica proscribes the consumption of certain programs by both children and adults.

The third aspect meriting attention here is that Pacifica is the first major case to downplay to this degree the concept of scarcity. The notion is mentioned, but it is referred to in a footnote in conjunction with a concern about children in the radio audience.

Implications of the Pervasiveness Rationale

In its rejection of the concept of scarcity as a regulatory rationale and its adoption of the pervasiveness rationale, the Court took a position that allowed the FCC to assume a protectionist stance consistent with trends presently occurring in other regulatory bodies.

As Robert Crandall, a Senior Fellow at the Brooking Institution, recently pointed out,[21] until as late as a decade ago, the word "regulation" was applied almost exclusively to government's attempt to control prices and licensing in industries such as transportation, utilities, communications and oil and gas production.

In contrast, this decade has witnessed the growth of new forms of regulation which emphasize health, safety and protection. The development of new regulatory bodies attests to this trend; for example, the Environmental Protection Agency, formed in 1970; the Occupational Safety and Health Administration, formed in 1970; and the Consumer Product Safety Commission, formed in 1972. The mission of these agencies is to act for the public to bargain on issues such as product safety, pollution, and workplace hazards.

In articulating the pervasiveness rationale for regulation of electronic media, the Supreme Court is allowing the FCC to become more philosophically consistent with the other regulatory commissions: within the "gap of ambiguity" it is giving the FCC a societally justifiable reason for regulating broadcasting -- certain protectionist policies, which otherwise might seem to be censorship, are now acceptable.